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SUMMARY RECORD OF THE 565th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 15 May 1995, at 9.30 a.m.

Chairman: Mr. GOH (Singapore)

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The meeting was called to order at 9.40 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4)

1. **The CHAIRMAN** invited the Commission to begin its consideration of the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, contained in the annex to the report of the Working Group on EDI on the work of its twenty-eighth session (A/CN.9/406). The Commission also had before it a compilation of comments on the text by Governments and international organizations (A/CN.9/409 and Add.1-4).

2. **Mr. SORIEUL** (Secretariat) drew attention to the report of the Working Group on the work of its twenty-ninth session (A/CN.9/407), at which the Group had considered a draft commentary on the Model Law and suggested possible improvements to the draft Model Law itself. Those comments, which referred to paragraphs 46, 52, 57, 68, 87, 89 and 96, should be considered by the Commission in its present discussion.

3. In the text of the draft Model Law (A/CN.9/406, annex), in all language versions except Spanish, the reference in article 8, paragraph (3), to "subparagraph (b) of paragraph (1) of article 8" should rather be to "article 7".

Title

4. **The CHAIRMAN** said that the Model Law was at present entitled "Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication". China had proposed that the law be called "Model Law on electronic commerce" (A/CN.9/409/Add.2). Mexico had proposed that the law be called "Model Law on legal aspects of electronic commerce" (A/CN.9/409/Add.1); and Singapore had proposed "Model Law on electronic data interchange" (A/CN.9/409).

5. **Mr. ABASCAL ZAMORA** (Mexico) said that two different concepts had been considered by the Working Group in its formulation of the title: a strict technical definition of EDI as structured language which passed between computers, and a broader concept which covered all other means of communication, such as e-mail, fax and the like. The Working Group had decided to adopt the latter concept, including both EDI in the strictly technical sense and other means of communication. Since it had felt that the Model Law could not cover all aspects of the subject, it had added the reference to "legal aspects" in the title.

6. A proposal had been made to replace the phrase "electronic data interchange" by "electronic commerce" in order to enable readers unfamiliar with the subject to understand what the contents of the Model Law were. That proposal would not change the scope of the Model Law. It had not won the necessary support in the Working Group but was now being put forward again by Mexico (A/CN.9/409/Add.1).

7. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that the present title was acceptable to his Government, but that it could usefully be shortened. It was not necessary to add the words "international" or "commercial", as that might result in a text which was insufficiently flexible in the light

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of unforeseeable future developments in technology. Civil engineering works had attained such an importance in the international economy that the Model Law should apply to them as well as to commercial activities. The title should be "Model Law on electronic data interchange".

8. **Mr. BURMAN** (United States of America) said that he supported the proposals by China and Mexico and was also in favour of deleting the phrase "legal aspects of". For practical reasons the text should be entitled "Model Law on Electronic Commerce". A short title would be simpler to use, would make it easier to explain the issues to outsiders and would thus help win acceptance for the Model Law. The present title, on the other hand, might make people think immediately of computer law, computer security, the regulatory aspects of communication, or property rights to data.

9. **Ms. ZHANG Yuejiao** (China) said she supported the proposals by the representatives of Mexico and the United States. It was the task of the Commission to regulate the application of new technologies to electronic commerce. Changing the title would bring it more into line with the Commission's mandate to develop international trade law. A short title would make the Model Law more easily acceptable.

10. **Ms. de LA PRESLE** (France) said that she disagreed with the representative of Mexico that changing the title of the draft Model Law would not change its scope of application. The originality and interest of the text lay in the fact that it dealt with electronic communication, which concerned a number of other areas besides electronic commerce, such as civil engineering, health and the environment. If the impression was given that the text was not relevant to such areas, electronic commerce itself might be affected, since it needed to have dealings with operators in those fields. It was also necessary to make the Model Law "sellable". The title could therefore be "Model Law on Electronic Communication".

11. **Mr. ALLEN** (United Kingdom) said that he agreed with the representatives of France and Morocco. First of all, to refer to "electronic commerce" in the title was to focus on entirely the wrong aspect. The focus should be on the means of communication, not on the subject; it was not a question of the underlying transaction, but simply of the procedure. Secondly, chapter II of the draft, which concerned the application of legal requirements to data messages, was based on general provisions of the law which were not limited to the commercial field. Hence, the Commission's rules, which modified those provisions, were also not limited to the commercial field. Even chapter III of the draft Model Law, on communication of data messages, was not expressly limited to commercial transactions as such. The Working Group had included article 1, which stated that the Model Law formed a part of commercial law, as a compromise. If the title itself were changed to "electronic commerce", the Commission would actually be changing the subject matter and shifting the focus in a way that would limit its freedom in discussing the substantive provisions. In addition, the word "commerce" was unclear and not widely used in law. If the Commission wished for a short title, it might consider "Model Law on Electronic Communication" as suggested by the French representative.

12. **Ms. BAZAROVA** (Russian Federation) said that she was in favour of the idea of shortening the title, but wished to keep the phrase "legal aspects". She agreed with the representatives of France and the United Kingdom that the title should have a broader scope of application and accordingly proposed "Model Law on Legal Aspects of Electronic Data Interchange".

13. **Mr. BONELL** (Italy) said that he fully shared the views expressed about the desirability of changing the title. However, he could not but agree with the comments made by the United Kingdom, as it would not be clear what the word "commerce" referred to. The phrase "electronic communication", on the other hand, was fairly neutral and would be comprehensible to those not familiar with the subject matter. He favoured the title "Model Law on Electronic Communication".

14. **Mr. CHAY** (Singapore) said that if the Model Law was intended to cover all aspects of electronic data interchange, the reference to "legal aspects" was redundant; he agreed with the representative of the United States that it should be deleted. He had some reservations as to the term "electronic commerce", because the Model Law was intended to govern the means of communication rather than the content, and the use of "electronic commerce" might shift the emphasis to the underlying transactions. In his view, the title should be shortened to "Model Law on Electronic Data Interchange".

15. **Mr. UCHIDA** (Japan) agreed that it would be preferable to change the title, especially in order to clarify the focus of the Model Law. In his view, the title should be "Model Law on Legal Aspects of Electronic Commerce" or "Model Law on Electronic Commerce".

16. **Mr. FARIDI ARAGHI** (Islamic Republic of Iran) said that the words "legal aspects" should be retained. He was strongly in favour of taking a broader approach and considered that the best title would be "Model Law on Legal Aspects of Electronic Data Interchange".

17. **Mr. BISCHOFF** (Observer for Switzerland) expressed his agreement with the views put forward by the representatives of France and the United Kingdom. The term "electronic commerce" was new, unknown as a legal expression and might be misleading. But he agreed with the representative of the United States of America that the title could be shortened by deleting the words "legal aspects of". He suggested that a possible compromise might be "Model Law on Electronic Communication, especially Electronic Data Interchange".

18. **Ms. BOSS** (United States of America) said that there clearly existed a consensus on the need to shorten the title and to make it broad and descriptive, but that there was disagreement on how those goals were to be attained. All the suggestions put forward so far had their advantages and disadvantages. The first suggestion, that the title should be "Model Law on Electronic Data Interchange", was the narrowest and referred only to one means of electronic communication. As it did not reflect the full scope of what the Model Law was intended to cover, her country could not support that suggestion. The second suggestion, "Model Law on Electronic Communication", was short and descriptive and reflected the Model Law's aim to cover electronic communications and their use in commercial transactions. In the United States, however, communication law was defined as the regulation of communication carriers, whereas the present Model Law was not a regulatory document but a document designed to facilitate commerce. As for "Model Law on Electronic Commerce", she recognized that "electronic commerce" was a new term, but it had been adopted in the United States and in much literature pertaining to the field in question. In everyday use it did not refer to transactions such as the sale of electronic equipment, but to the means by which trade was conducted. Although the phrase might not necessarily be used in other countries with that meaning, she nevertheless considered it the best solution. Her second choice would be "Model Law on Electronic Communication".

19. **Mr. MAHASARANOND** (Thailand) agreed with the representative of the United Kingdom that the title should place the emphasis on electronic communication. The reference to international trade law could be expressed by an additional phrase. He suggested that the title should read "Model Law on Electronic Communication in International Trade Law".

20. **Mr. GRIFFITH** (Australia) considered that reference to electronic data interchange alone was too narrow, but recognized that, to some representatives, the term "electronic commerce" constituted a new expression of somewhat uncertain meaning. He suggested that the title should read "Model Law on the Legal Aspects of Electronic Commerce, including Electronic Data Interchange". An alternative means of achieving the same effect would be to insert the words "including EDI" in article 1 on the sphere of application. In his understanding, the application of the Model Law was intended to be commercial. That should be shown in the title, and the shortest way of doing so was to use the phrase "electronic commerce".

21. **Mr. SCHNEIDER** (Germany) considered that the present title was too long, too complicated and too narrow. The term "electronic data interchange" was not perfectly clear as a legal expression. The title should be short and clear and should help to make the Model Law acceptable. As the suggestion made by the representative of Italy to call it "Model Law on Electronic Communication" might be misleading in the United States, it might be possible to replace the word "communication" by the words "data messages in commerce". That said, however, he could go along with the term "electronic commerce".

22. **Mr. GILL** (India) said that, in his understanding, electronic data interchange referred to paperless trading involving the computer-to-computer transfer of transactions using agreed standards to structure the data. He agreed with Germany that a shorter name would be preferable and more attractive to potential users of the Model Law. He therefore supported the title "Model Law on Electronic Commerce".

23. **Ms. REMSU** (Observer for Canada) agreed with France, Morocco and the United Kingdom. There should be no reference to "commerce", as that would give the wrong focus. The title should reflect a broader approach. The present title appeared to be inconsistent with the principles followed in the Working Group that the title should be neutral with respect to the media and should cover information that was stored but not communicated. She suggested that a title along the lines of "Legal Aspects Related to the Use of Electronic Technologies" would be sufficiently broad and not misleading.

24. **Mr. VRELLIS** (Observer for Greece) felt that the title of the law should not necessarily have to reflect all its contents. There were many examples in national systems of laws which covered more than their titles suggested. He therefore supported the title "Model Law on Electronic Commerce", it being understood that nobody could expect all electronic commerce to be governed by such a text.

25. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that the term "electronic commerce" was meaningless, unhelpful and a potential source of confusion and ambiguity. The subject matter was not so much commerce as communication: the text was concerned with data that were produced, stored and communicated by electronic, optical or similar means. Such data might be related to commerce, but could also be related to the environment, to civil works or to other matters. Conventional methods of communication, such as writing or the telephone, had recently been joined by more sophisticated means such as computers, and it was the latter field that the law was meant to cover. It was not concerned with electronic commerce in the sense of the sale of electronic equipment.

26. **Mr. AL-NASSER** (Saudi Arabia) said that the title should not be confined to electronic commerce, as that would give the impression that the law was only concerned with electronic equipment. He therefore agreed with other speakers that a reference to data that were exchanged by computer should be included. Such data could be related to records, or to the preparation of contracts by computer rather than on paper.

27. **Mr. ABASCAL ZAMORA** (Mexico) felt that it would be helpful to suspend the discussion for the time being and consider the Model Law's actual scope and the meaning of the terms used. It would then be possible to discuss the title with a clearer idea of what was wanted.

28. **Mr. AL-ZEID** (Observer for Kuwait) said that the title should be brief, to the point and as broad as possible. The word "interchange" covered all forms of information and thus gave the Model Law a broader scope than a reference to "international commerce" would have done. For example, as the representative of France had pointed out, the interchange could be concerned with the environment or civil works.

29. **The CHAIRMAN** said he had gathered the impression that the Commission considered the present title too long. Three suggestions had been put forward, namely, to call the text a "Model Law on Electronic Data Interchange", a "Model Law on Electronic Commerce", or a "Model Law on Electronic Communication". He suggested a fourth possibility, namely, a "Model Law on Electronic Means of Communication". After having asked members to indicate their preferences, he said that the majority appeared to favour the first suggestion, namely, "Model Law on Electronic Data Interchange".

30. **Mr. GRIFFITH** (Australia) said that it was not fair to ask people to vote on a choice before knowing the alternatives. It was necessary to reduce the possibilities to two before a majority view could be ascertained.

31. **Mrs. SCARNATI ALMADA de CURIA** (Argentina) asked whether the procedure just followed had been a formal vote, or merely an indication as to the general direction in which a consensus might lie. If it had been a formal vote, observers should not have been taking part.

32. **The CHAIRMAN** said that he had merely been asking for an indication of preferences.

The meeting was suspended at 11.05 a.m. and resumed at 11.35 a.m.

33. **Mr. HERRMANN** (Secretary of the Commission), referring to the procedural question raised by the Argentine representative, said that there had been no departure from the usual practice of the Commission, which followed the procedures of the General Assembly as one of its organs. Only members of the Commission were entitled to take part in formal votes; however, in 20 years there had only been a single instance of a formal vote being taken. The Commission used indicative voting, because it relied on the consensus principle, and it had always been its tradition to allow observers to participate in the indicative voting, since that enabled the views of the whole international community with its different legal traditions to be taken into account. It was a way of speeding up the procedure by not requiring each delegation to state its preference.

34. **Mr. BURMAN** (United States of America) observed that the Commission was a technical body and followed non-political traditions. It was generally accepted that the Commission should use indicative signs of support, which, although sometimes referred to as indicative votes, were understood not to be formal

(*Mr. Burman, United States of America*)

voting procedures. It was important that no distinction should be made in those informal voting procedures between observers and members so that it would be possible to get a true picture of the extent of support for a given proposal and hence of the possibility of achieving widespread utilization of the Commission's instruments.

35. **Ms. REMSU** (Observer for Canada), returning to the question of the title, asked for clarification as to the difference between "Electronic means of communication" and "Electronic communication".

36. **Mr. ALLEN** (United Kingdom) suggested that another possible title would be "Model Law on Electronic Messages and Records".

37. **The CHAIRMAN** explained that concern had been expressed that "Electronic communication" could be considered too broad, as it covered the use of broadcasting, satellites and telephones. "Electronic means of communication" might thus be a better title, since the instrument covered the sending and receipt of messages.

38. He suggested that further debate on the title should be postponed in order to allow time for informal consultations.

Article 1

39. **Mr. SORIEUL** (Secretariat) said that the present version of article 1 was the result of a compromise reached by the Working Group at its latest session. Discussion had centred on whether the text should contain a reference to commerce, to commercial information, or to commercial transactions. The solution adopted was to say that the Model Law formed part of commercial law and to refer in a footnote to the definition of the term "commercial".

40. He drew attention to the other two footnotes, the first stating that the Model Law did not overrule any rule of law intended for the protection of consumers and the second suggesting a text for States that might wish to limit the applicability of the Model Law to international data messages.

41. **Mr. BONELL** (Italy) said that the words "This Law forms part of commercial law" in article 1 created many problems. "Commercial law" had different meanings in different countries and even within them. In Italy, for instance, there were at least four or five opinions on what commercial law was, and in fact the term no longer appeared in Italian legal texts. The definition in the footnote had been taken from the Model Law on International Commercial Arbitration, but it made no sense in the context of the Model Law under discussion and did not properly describe commercial law, at least as understood in some national jurisdictions. The Commission should therefore try to find wording reflecting the main concern, which was that the Model Law should not affect laws designed to protect the consumer.

42. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that his delegation found the formulation of article 1 too restrictive, even though Morocco did apply commercial law. If the instrument was to be comprehensive, covering all types of information in the form of data messages, whether commercial, environmental, agricultural or other, the text of article 1 was inadequate. The commercial law mentioned in

(*Mr. Chaukri Sbai, Observer for Morocco*)

article 1 did not apply to all persons, undertakings or activities, but only to traders or merchants. He therefore proposed the following wording: "This Law forms part of commercial law. It applies to any kind of information in the form of a data message, regardless of the parties to the relation, be they merchants or not."

43. **Mr. ABASCAL ZAMORA** (Mexico), referring to the remarks made by the representative of Italy, said that it had emerged in the course of the preliminary deliberations in the Working Group that, if the draft Model Law was to provide a set of rules encompassing all aspects of all branches of law in all countries, it would be virtually impossible to reach consensus. That would have required universal agreement on the notions of writing, signature and original, on the admissibility of data messages as evidence in judicial, arbitral and administrative proceedings, on the binding nature of all expressions of intent made through data communications, and on the obligation to keep records and information stored in data form, which would call for agreement regarding invoices, documents for presentation to customs authorities, wills, claims and petitions brought before the courts and administrative authorities, reports submitted to the authorities, including financial statements to regulatory bodies, and many other matters. The Working Group had therefore decided to adopt the working principle of confining itself to the natural ambit of UNCITRAL, namely, the regulation of trade. That was the reason for the reference to commercial law in article 1.

44. It should be pointed out that the scope of application was not restrictive. Indeed, the Working Group had previously rejected a suggestion that article 1 be amended to state that the draft Model Law did not apply to administrative and other non-commercial activities, and, at its twenty-ninth session, a proposal had been made to change the text of the draft Guide to Enactment with a view to allowing implementing States to extend the scope beyond the commercial sphere (A/CN.9/407, para. 38).

45. With regard to the question of defining the term "commercial", a similar problem had arisen at the time of drafting the UNCITRAL Model Law on International Commercial Arbitration. There had been difficulties not only for common-law countries, which did not differentiate between civil and commercial law, but also for countries that did. The concept of commercial law in Mexico, for example, did not cover the same areas as in Brazil or Spain, despite their close cultural ties. The Working Group had accordingly adopted the solution of including a footnote along the lines of the footnote in article 1 of the UNCITRAL Model Law on International Commercial Arbitration.

46. **Mr. SCHNEIDER** (Germany) said that the Working Group had been fully aware of the problems that would be created in practice by the issue just raised by the representative of Italy. Most members of the Working Group had been of the opinion that the Model Law should deal solely with data messages in commerce and not outside it; the difficulty lay in the drafting. The Italian representative's proposal for the simple exclusion of consumers was unsatisfactory, since there were possibly as many as 10 different definitions of that term within European law alone. Problems would undoubtedly have arisen whatever definition had been chosen. The current formulation of article 1 was the outcome of a compromise and should not be changed.

47. **Mr. BURMAN** (United States of America) said that his delegation wished to associate itself with the remarks of the representative of Germany. The wording of article 1 was not perfect, but was the product of substantial discussions in the Working Group. If further clarification was necessary, perhaps the amendment suggested by the Government of Singapore (A/CN.9/409) might serve to improve the language.

(*Mr. Burman, United States of America*)

48. From the comments made by some speakers at the current meeting, he felt that the Commission needed to decide how it was going to proceed in its deliberations. It had two options: it could follow the usual practice, whereby, when a draft text was submitted for consideration in plenary session after having undergone discussion at the working group level over several years, it was for the purpose of final adjustment, clarification of any unresolved points and possible textual improvements, and the text would remain essentially intact unless there was a strong body of contrary opinion; alternatively, it could reopen the entire debate, as if the years of concentrated working group effort had never taken place. Were the Commission to adopt the second approach, even three weeks would not be enough to complete its discussion of the current agenda item. He hoped that the Chairman would provide some clarification on the matter.

49. **Mr. VRELLIS** (Observer for Greece) said that the term "commercial law" appearing in article 1 was at the very least ambiguous. A matter that was part of commercial law in one country could come within civil or penal law in another. It would be preferable to reconsider the use of the term. If there had to be provision on the matter, a formulation already used in some international instruments binding common-law and civil-law countries — such as the 1968 Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters — could be adopted, in which case article 1 might read: "This Law applies to any kind of information in the form of a data message in the commercial sphere".

50. **Ms. ZHANG Yuejiao** (China) proposed that article 1 be amended to read: "This Law applies to any kind of information in the form of a data message in commercial activities". That formulation would resolve the problem of different definitions of commercial law in different countries and would also underscore the main purpose of the Model Law.

51. **Mr. GRIFFITH** (Australia) considered the Commission should refrain from substantial re-writing or re-discussion of the draft text at the present stage. In his view, the first sentence of article 1 meant nothing, and he therefore did not object to it. At previous sessions of the Working Group, some States had considered it useful for their purposes. However, if it was purely a matter of form, the sentence could perhaps be repositioned at the beginning of the footnote. That would make the text cleaner, and enacting States would be aware that they could limit the Model Law to commercial law or give it a wider sphere of operation should they so wish.

52. **Mr. BONELL** (Italy) said that he had raised the issue of the meaning of "commercial law" not only because it was a matter of great importance but also because his delegation understood that the wording in question was the result of a last-minute drafting change. As an alternative, he would be in favour of adopting a formulation along the lines suggested by Singapore and Greece, together with the proposed amendment of the footnote.

53. **Mr. ALLEN** (United Kingdom), endorsing the remarks made by the representatives of the United States of America and Germany, said that, although the text of article 1 as it stood was not ideal, it was unlikely that the Commission could arrive at another formulation that would achieve consensus. He agreed with what the representatives of Australia and Italy had just said. It would further the compromise if the footnote to the text of article 1 was remodelled in line with the footnote to the heading of the article.

54 **Mr. CHOUKRI SBAI** (Observer for Morocco) said that his delegation felt that the debates in the Commission's plenary sessions were useful and necessary. With regard to the matter under discussion, he wished to propose that the first sentence of article 1 be deleted and that the second sentence be reworded as follows: "This Law applies to any kind of information in the form of a data message". That would accommodate all the wishes expressed.

The meeting rose at 12.30 p.m.